

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA *ex rel.*)
RIBIK)

VS.)

1:09-CV-13

ALEXANDRIA, VIRGINIA
OCTOBER 27, 2017

HCR MANORCARE, INC., *et al.*)
_____)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

FTR GOLD

Proceedings reported by stenotype, transcript produced by
Julie A. Goodwin.

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1 (OCTOBER 27, 2017, *FTR GOLD*, 2:02 P.M., OPEN COURT.)

2 THE COURTROOM DEPUTY: *Ribik versus Manor Care, Inc.,*
3 *et al.*; Case Number 09-CV-13.

4 Counsel, please note your appearances for the
5 record.

6 MR. SPONSELLER: Good afternoon, Your Honor. Richard
7 Sponseller, Assistant U.S. Attorney.

8 THE COURT: Good morning, Mr. Sponseller.

9 MR. SPONSELLER: Here with my Department of Justice
10 colleagues, Allison Cendali, who is going to be addressing the
11 Court this afternoon.

12 THE COURT: All right.

13 MR. SPONSELLER: And David Wiseman. I believe you're
14 familiar with both of them.

15 THE COURT: All right. Thank you, Mr. Sponseller.

16 MR. DUBELIER: Good afternoon, Your Honor. Eric
17 Dubelier --

18 THE COURT: Good afternoon.

19 MR. DUBELIER: -- and Katherine Seikaly for the
20 defendants.

21 MR. DOWNEY: Good morning, Your Honor. Jeff Downey
22 for Relator Ms. Ribik. We filed a brief to augment the
23 Government's argument. And if the Court is inclined, we'd like
24 a few minutes of Your Honor's time.

25 THE COURT: All right.

1 MR. DOWNEY: But understand that this matter has been
2 briefed.

3 THE COURT: All right. This is on the defendants'
4 motion for sanctions.

5 Mr. Dubelier, I've read all of the briefs and I've
6 looked at all of the transcripts. And is there anything that
7 you want to add? I regard your reply brief as well.

8 MR. DUBELIER: No, there's not, Your Honor, unless you
9 have any specific questions.

10 THE COURT: I do not.

11 MR. DUBELIER: Thank you.

12 THE COURT: I'd like to hear from the Government. And
13 I do have some questions for the Government.

14 MS. CENDALI: Of course, Your Honor. I'm prepared to
15 answer any questions that you have today.

16 Your Honor, there are two issues before the Court.
17 One is the late production of Dr. Clearwater's notes; and, two,
18 is the production of the draft beneficiary profiles that became
19 the final expert report that was submitted by Dr. Clearwater.
20 And I'd like to address both of those with you today.

21 With respect to Dr. Clearwater's notes, it is
22 regrettable that the notes were produced late, Your Honor. As
23 soon as the United States counsel learned that the notes
24 existed, we informed defense counsel that there were additional
25 notes consistent with our obligations under the rules.

1 THE COURT: But why did you wait a month to produce
2 them until after the motion in limine and after the motion for
3 summary judgment was filed?

4 MS. CENDALI: Your Honor, that was not intentional.

5 THE COURT: You had to know how important these were.

6 MS. CENDALI: We did, Your Honor. And the ex -- we
7 tried to expedite the production of the notes as quickly as
8 possible.

9 THE COURT: What -- what could have taken so long
10 to -- to review? I mean, we -- you admit that all of these
11 should have been turned over.

12 MS. CENDALI: Yes, Your Honor.

13 THE COURT: So why would it take weeks to turn them
14 over? If they're -- if they are discoverable and the
15 defendants have a right to them, why would it -- why would you
16 have to take weeks to look at them before you turned them over?

17 MS. CENDALI: Your Honor, there were some issues that
18 were technical issues with the processing of the documents into
19 the database, so they were put into a review platform for us to
20 review and that did take some time, Your Honor. And that --

21 THE COURT: What do you mean --

22 MS. CENDALI: -- again is regrettable.

23 THE COURT: What do you mean it took some time to put
24 into a review platform?

25 Was it your review that took weeks or was it

1 putting into this platform, whatever that is?

2 MS. CENDALI: It was both, Your Honor.

3 THE COURT: And so did you --

4 MS. CENDALI: We received --

5 THE COURT: -- ever inform -- and I take it you did
6 not. You never informed defendants or the Court that there
7 were these notes out there that had not been produced, and
8 perhaps it would make sense that the defendants would have a
9 right to see that before they filed the motions. You knew the
10 motions were coming.

11 MS. CENDALI: Your Honor, we did, and we did inform
12 counsel on September 20th, the day that we learned about the
13 notes --

14 THE COURT: Right.

15 MS. CENDALI: -- that the notes existed --

16 THE COURT: But you never --

17 MS. CENDALI: -- and that we were --

18 THE COURT: -- told them the volume of the notes --

19 MS. CENDALI: We did not --

20 THE COURT: -- or --

21 MS. CENDALI: -- know the volume of the notes at that
22 time -- at that point in time, Your Honor.

23 THE COURT: When did you -- you learned of the
24 documents on the 20th of September. Correct?

25 MS. CENDALI: That is correct. We learned from

1 AdvanceMed's counsel who was responsible for collecting
2 documents from AdvanceMed, and Dr. Clearwater --

3 THE COURT: When did you --

4 MS. CENDALI: -- is an employee of AdvanceMed.

5 THE COURT: -- receive them?

6 MS. CENDALI: We received them on September 27th.

7 THE COURT: Okay. So you still didn't inform
8 Mr. Dubelier how many there were, did you?

9 MS. CENDALI: We did not know how much that there were
10 until they were put into the platform, Your Honor.

11 THE COURT: Well, wait a minute. We're first talking
12 about a handwritten set of notes in a notebook.

13 MS. CENDALI: That is correct, Your Honor.

14 THE COURT: That didn't take --

15 MS. CENDALI: They're scanned copies.

16 THE COURT: -- any uploading or platforming or
17 anything else. Correct?

18 MS. CENDALI: That is correct, Your Honor.

19 THE COURT: So, why weren't those promptly produced?
20 Why would they take weeks to produce?

21 MS. CENDALI: Your Honor, again, we had the notes. We
22 were trying to review them as quickly as we could so that we
23 could determine whether or not the patients in there were
24 indeed ManorCare patients or whether or not there were notes
25 with discussions from counsel on there, Your Honor.

1 THE COURT: Well, you knew when they were taken, did
2 you not? Didn't Ms. Clearwater tell you when she took these
3 notes?

4 Wasn't it evident that they were notes about the
5 patients?

6 MS. CENDALI: It was notes about patients, but
7 Dr. Clearwater conducts reviews for other -- for other projects
8 for DOJ.

9 THE COURT: But she told you, and you understood as of
10 September 20th at the latest, that these were notes related to
11 this case and these patients. Isn't that correct?

12 MS. CENDALI: That is correct, but I -- we had not
13 seen the notes to confirm that, Your Honor.

14 THE COURT: All right.

15 MS. CENDALI: Nor did we know whether or not
16 Dr. Clearwater -- and she could -- she did not tell us whether
17 or not the notes also contain notes from discussions with
18 counsel, so we wanted to make sure that those notes did not
19 contain those discussions.

20 THE COURT: All right. Anything else?

21 MS. CENDALI: Yes, Your Honor. We relied on
22 Dr. Clearwater's representations regarding the fact that she
23 did not have notes.

24 THE COURT: Well, let me --

25 MS. CENDALI: And I know --

1 THE COURT: Let me ask you this.

2 MS. CENDALI: Sure.

3 THE COURT: Because it's clear that the defendants
4 requested notes, such as these, in their requests for
5 production of documents a year ago. And these notes were
6 responsive to that request for production of documents. Yet,
7 it appears as though the Government didn't actually ask
8 Dr. Clearwater about notes until her deposition subpoena was
9 issued. Is that correct?

10 MS. CENDALI: That is not correct, Your Honor. And if
11 that's --

12 THE COURT: Well, that's what your brief --

13 MS. CENDALI: -- not clear --

14 THE COURT: -- says.

15 MS. CENDALI: I'm sorry.

16 THE COURT: That's what your brief says. And that's
17 what your declaration from Ms. Reed says.

18 MS. CENDALI: That wasn't the first time that we had
19 asked for notes, Your Honor. Over the course of our work with
20 Dr. Clearwater, and especially when it became clear that the
21 case was going into litigation, we had discussed and requested
22 notes from Dr. Clearwater, notes relating to the review. And
23 we asked that she confirm with her team of whether or not any
24 notes existed.

25 THE COURT: But she apparently never did that, did

1 she? Because Ms. Jessee testified that she was never asked
2 about notes until the day before her deposition. And I take it
3 that that was probably the Department of Justice attorneys who
4 asked her about that.

5 MS. CENDALI: That is correct, Your Honor. We --

6 THE COURT: So that's in -- that's not true. If she
7 told you that she had asked her nurses about notes, then that
8 was not true. Is that correct?

9 MS. CENDALI: Um --

10 THE COURT: How could I come to any other conclusion?

11 MS. CENDALI: That is correct. Dr. Clearwater
12 represented that the reviewers used the beneficiary profiles,
13 those electronic documents, to track the information that they
14 were doing in the medical review to take notes.

15 THE COURT: Okay. So she never -- but she never asked
16 her nurses, as she told you she did, that there -- were there
17 any notes.

18 MS. CENDALI: I don't know that for certain, Your
19 Honor.

20 THE COURT: But we do know that, because Ms. Jessee
21 testified that no one asked her about any notes until the day
22 before her deposition.

23 MS. CENDALI: That's correct --

24 THE COURT: Right?

25 MS. CENDALI: -- Your Honor. Yes.

1 THE COURT: So, why also -- I'm having trouble
2 reconciling her testimony that there were no electronic notes.
3 She testified that they never used the comment feature of the
4 Word documents to communicate or to make notes. And she, I
5 assume -- did you ask her about electronic notes as well?

6 MS. CENDALI: I did, Your Honor. We did --

7 THE COURT: And she said there were none?

8 MS. CENDALI: She said that the only notes were those
9 from the drafts of her -- that what became her final report.
10 And we had seen those drafts, and those comments were for the
11 most part discussions about rewording things or typos or
12 citations --

13 THE COURT: So she --

14 MS. CENDALI: -- to the record.

15 THE COURT: -- never disclosed to you all of these
16 electronic notes that were the communication method between the
17 nurse reviewers and Dr. Clearwater. Is that correct?

18 MS. CENDALI: No, that's not correct. She disclosed
19 to us that there were the drafts of her report, and so we knew
20 that those existed. And I believe in her testimony --

21 THE COURT: So you never looked at them to see that
22 there were indeed -- and I can see in here as the exhibits that
23 were produced to me, that there were questions and comments by
24 various people on these -- on this Word document. Correct?

25 MS. CENDALI: That is correct, Your Honor.

1 THE COURT: And so that would have been discoverable
2 by the defendants, as you now concede. Correct?

3 MS. CENDALI: Well, Your Honor --

4 THE COURT: And should have been turned over to them
5 prior to the deposition in compliance with the discovery
6 requests. Isn't that correct?

7 MS. CENDALI: Well, Your Honor, the United States
8 relied on the Rule 26(b)(4) that these were drafts of the
9 expert report. Because in fact, Your Honor, if you can look at
10 the -- those documents and if a comparison is made --

11 THE COURT: But you've conceded now that they are
12 discoverable by the defendants, because they were draft reports
13 before they were turned over to you. They're not drafts
14 between you and the -- and Ms. Clearwater. They were drafts
15 between she and her nurse reviewers that contained comments,
16 questions, judgments, re-judgments, changing of times that were
17 appropriate - all kinds of back and forth prior to the report
18 being produced. And they had specifically asked in the request
19 for production of documents for any documents that were -- that
20 reflected a difference of opinion between the reviewers.
21 Correct?

22 MS. CENDALI: That is correct, Your Honor.

23 THE COURT: So this -- you've conceded that this was
24 entirely discoverable. You've turned it over to them now. So
25 my question is, you now represent to me as an officer of the

1 Court that you were -- that you asked Ms. Clearwater about
2 those notes, and that she's telling -- she told you that there
3 were none others than these drafting kind of errors or changes.
4 Is that correct?

5 MS. CENDALI: That is correct, Your Honor.

6 THE COURT: So that is another untruth that she told
7 you then. Is that correct?

8 MS. CENDALI: That is something that --

9 THE COURT: It's correct. Say it as --

10 MS. CENDALI: That's correct, Your Honor.

11 THE COURT: Okay.

12 Now, I have some more questions.

13 MS. CENDALI: Sure.

14 THE COURT: As I understand it from your declaration
15 and your brief, Department of Justice attorneys never asked the
16 nurses directly about their notes. You relied on Clearwater
17 and Bogan.

18 MS. CENDALI: And counsel for AdvanceMed, Your Honor.
19 Yes, that is correct. Those were the two people that the
20 United States engaged --

21 THE COURT: Isn't that -- isn't Bogan counsel for
22 AdvanceMed?

23 MS. CENDALI: No, that's Brandy Reed. She
24 submitted --

25 THE COURT: Okay.

1 MS. CENDALI: -- a declaration as well.

2 THE COURT: All right. I had that backwards then.

3 Okay.

4 MS. CENDALI: Sure.

5 THE COURT: So who is Bogan?

6 MS. CENDALI: Ms. Bogan is one of the nurse reviewers
7 who assisted Dr. Clearwater, but she's --

8 THE COURT: So you didn't ask all the nurses
9 yourselves. You relied on them?

10 MS. CENDALI: We did, Your Honor. We didn't think
11 that that was unreasonable to rely on them --

12 THE COURT: I'm just --

13 MS. CENDALI: -- for their representations.

14 THE COURT: -- clarifying.

15 MS. CENDALI: That is correct.

16 THE COURT: Now, at the deposition, Ms. Clearwater
17 represented and stated that she would ask her nurses then if
18 they had any notes. Correct?

19 MS. CENDALI: That is correct.

20 THE COURT: But Ms. Jessee, again, said she was never
21 asked about notes until the day before the deposition when
22 Department of Justice attorneys asked her.

23 So, she apparently, even though she represented
24 that she would -- in fact, later in the deposition she said she
25 had sent an e-mail I guess during a break. That apparently

1 did not happen. Is that correct?

2 MS. CENDALI: So, Your Honor, I think that there's
3 some confusion in the exchange. What was asked of
4 Dr. Clearwater was whether or not she had notes or whether any
5 of the reviewers took notes during meetings or discussions
6 between the reviewers. And so that is the question that she
7 posed to the reviewers.

8 THE COURT: Well, she was asked about notes
9 repeatedly.

10 MS. CENDALI: Yes, she was, Your Honor.

11 THE COURT: And she repeatedly said, I do not recall.
12 Which in and of itself is -- that's another subject.

13 But, if I look at her transcript...

14 All right. She asked about notes: Did the nurse
15 reviewers take any notes?

16 I don't know.

17 Did you ask them whether they took notes?

18 No.

19 So that's directly contrary to what they
20 told -- she told you.

21 Do you know whether or not they have any notes of
22 any of the discussions?

23 I don't.

24 Okay. Is there a way, could you find out?

25 I don't think so.

1 Then they ask, You mean there's no way we
2 could -- you could ask?

3 She said, I could call them, yes.

4 Are you going to do that tonight?

5 I don't know.

6 I'm going to ask you to do it. Are you going to do
7 it?

8 I'll call and ask, I suppose.

9 Well, you suppose? Yes or no?

10 Yes, I will. Yes, I will call and ask them if
11 that's what you would like.

12 Then later, she said, on page 82 to 83:

13 Did you ever take a note ever with
14 pace -- piece -- pen or a piece of paper about questions that
15 was asked to you by one of the reviewers?

16 I don't recall.

17 Did any of your reviewers do that?

18 I do not know.

19 Have you asked them?

20 Yes.

21 And what did they say?

22 They didn't recall.

23 So, she never asked Jessee.

24 Let's see. Then later, she says -- hold on a
25 minute.

1 Here it is. Page 502:

2 Do you know whether or not your other reviewers
3 have notes that they kept during these reviews to indicate
4 specifically what they've put their eyes on?

5 I don't know.

6 You don't know?

7 I don't know.

8 Have you ever asked them?

9 Yes. I've asked to send me an e-mail as you had
10 asked.

11 Okay. So when you asked them whether or not they
12 had any notes indicating what specifically they had looked at
13 in the medical charts, did they answer?

14 And it's repeated.

15 She said, The information that we looked at is
16 tracking.

17 So she never -- she says that she sent an e-mail to
18 them, but she apparently did not. So that was not truthful.
19 Correct? Because Jessee said she was never asked about notes.

20 MS. CENDALI: That is correct. I think there was some
21 confusion, though, on the part of --

22 THE COURT: Well, how was --

23 MS. CENDALI: -- Dr. Clearwater, Your Honor.

24 THE COURT: -- there an e-mail asked about notes if
25 Jessee said she was never asked for her notes until the day

1 before?

2 MS. CENDALI: Um --

3 THE COURT: Jessee never testified, I was asked about
4 different notes. She said, I was never asked about notes until
5 the day before.

6 That's -- so that's incorrect, isn't it?

7 MS. CENDALI: According to that transcript, that is
8 incorrect, Your Honor.

9 THE COURT: I'm having a lot of trouble understanding
10 how someone could forget a whole notebook full, 131 pages of
11 notes, which is a lot of writing if you ask me. It's like a
12 book. How could she forget that she had these notes?

13 MS. CENDALI: I share that, Your Honor, as well.
14 And I believe --

15 THE COURT: And how could she not recall --

16 MS. CENDALI: -- that she misunder -- I think she
17 misunderstood, though, the notes.

18 THE COURT: But she obviously never even looked for
19 them, as she represented she had, if she so easily found them
20 in one filing cabinet in her home.

21 MS. CENDALI: Your Honor, I think she was focused on
22 the filing cabinet that included the ManorCare file where that
23 is where she kept her records that she had for the ManorCare
24 case.

25 THE COURT: How can I possibly find her credible --

1 (RECORDING SKIPS, THEN CONTINUES)

2 THE COURT: -- comment section of the Word documents
3 when clearly -- and Jessee testified that that was how the
4 nurses communicated. How can I find that she was credible at
5 all in her testimony when she has now, we know at least three
6 times, said untruthful statements in her deposition and to
7 Government lawyers?

8 How can I find any of her testimony credible when
9 we have, and you agree, that she was not truthful with you and
10 she was not truthful in her deposition?

11 MS. CENDALI: Your Honor, I think that there was some
12 confusion on Dr. Clearwater's part. And I think even the trial
13 tran -- the deposition transcript shows that there were
14 inconsistent statements in her testimony --

15 THE COURT: You've told me that you agree that she had
16 to have lied to you about whether she asked nurses for notes,
17 that she had to have said untruths in her deposition about
18 whether she asked the nurses for notes, that she had to have
19 been untruthful in her deposition about whether or not they
20 used the comment section of the Word document. And that's,
21 frankly, very clear.

22 Even if you can somewhat excuse or try to excuse or
23 come up with some theory to excuse her not producing her
24 handwritten notes, how can you possibly reconcile her testimony
25 in the deposition about the comment section of the Word

1 document? How am I ever supposed to conclude anything other
2 than the fact that she's untruthful?

3 MS. CENDALI: Your Honor, I think that she just didn't
4 recall. I don't think her memory was very good with the
5 situation --

6 THE COURT: 5,000 pages?

7 MS. CENDALI: Those comments were --

8 THE COURT: 5,000 pages of comments, and Jesse
9 testifies that that was the way they communicated was through
10 the notes. How could somebody not remember that? If that's
11 the way she's communicating with her notes -- her nurses, as
12 they're reviewing these files, over a long period of time, and
13 this is the way they communicate is through the notes, how
14 could she possibly not recall that?

15 And I've got to tell you, I find suspect that the
16 fact that she repeats over and over and over when they try to
17 pin her down about notes, "I don't recall, I don't recall, I
18 don't recall," how am I supposed to find that that's anything
19 other than evasion?

20 MS. CENDALI: Your Honor, I just don't think her
21 memory was that good about what was happening during the review
22 period. It -- she started the review in 2013, and it continued
23 on through 2016.

24 There were hundreds of pages of medical records.
25 She had conversations with the nurse reviewers on multiple

1 occasions. They communicated a lot by phone, and not just in
2 the comment bubbles that you see there. And I really do
3 believe that Dr. Clearwater just was somebody who is not a
4 professional witness. I think three days of deposition
5 testimony was hard on her, and I just don't think that she
6 performed --

7 THE COURT: Well, you would think after she was asked
8 a half a dozen times that it might occur to her that maybe she
9 did. It wasn't one question and one answer and she forgot.
10 She was asked repeatedly over a number of days.

11 Don't you think she might have gone home at night
12 and thought, wow, you know, I wasn't really thinking about the
13 notes comment of this on the words -- on the Word document.
14 You know, that wasn't accurate. Maybe I should correct my
15 testimony when I go in tomorrow.

16 That never happened, did it?

17 MS. CENDALI: No, it didn't, Your Honor.

18 THE COURT: Okay.

19 And she also testified that there was no reviewed
20 protocol that the nurses used when, in fact, there was one, a
21 numerical rating system, wasn't there?

22 MS. CENDALI: No, Your Honor. I think that there's
23 some misapprehension about what that is. That was -- those
24 numeric numbers were used by the reviewers to track how many or
25 what types of denials they made. That wasn't a review protocol

1 in the respect that it was a guidance to show the reviewers the
2 step-by-step review process. And I think the --

3 THE COURT: Well, she was asked repeatedly about the
4 process, and she said that they just relied on the manuals.
5 She never testified that they used a numerical system for
6 scoring.

7 MS. CENDALI: It wasn't for scoring though, Your
8 Honor. It was to keep track of the -- the types of denials
9 that were being made. It wasn't --

10 THE COURT: Hold on just a minute.

11 MS. CENDALI: It wasn't used as a review --

12 THE COURT: I'm sorry. You're going --

13 MS. CENDALI: I'm sorry.

14 THE COURT: -- to have to stop because our recording
15 system stopped working.

16 When did it stop?

17 We've got to get it up and running before we go
18 further.

19 MS. CENDALI: Sorry. Yes, Your Honor.

20 THE COURT: Can we get Lance up here? All right.

21 I'm going to take a brief recess because I want
22 this to be on the record.

23 THE LAW CLERK: All rise. The Court takes a brief
24 recess.

25 (RECESS TAKEN.)

1 THE LAW CLERK: Please be seated and come to order.

2 THE COURT: All right. So I don't know at what point
3 the recording process stopped, but to recap, Ms. Cendali, we've
4 reviewed the deposition transcript of Ms. Clearwater together,
5 and we've talked about Ms. Jessee's transcript excerpts. And
6 the Government's briefed some of the exhibits, and the
7 Government has agreed that Clearwater was not truthful with the
8 Government on several occasions during the course of the
9 discovery when she represented that she looked for notes and
10 had none, that she had asked her nurses about notes when she
11 had not, and that they did not make electronic notes to
12 communicate when they did. Correct?

13 MS. CENDALI: Your Honor, I believe that those were
14 all honest mistakes by Dr. Clearwater --

15 THE COURT: I understand. But you have conceded that
16 that's correct.

17 MS. CENDALI: I will not concede that she lied. I
18 think that she --

19 THE COURT: Well, I --

20 MS. CENDALI: -- honestly did not --

21 THE COURT: Ms. Cendali.

22 MS. CENDALI: Yes, Your Honor.

23 THE COURT: You and I had a direct back and forth, and
24 you agreed that she was not truthful with the Government, at
25 least, and on some of her statements in the deposition. Isn't

1 that correct?

2 MS. CENDALI: Your Honor, I think in --

3 THE COURT: Don't --

4 MS. CENDALI: -- in reflecting --

5 THE COURT: Don't prevaricate. I'm asking you about
6 our exchange.

7 MS. CENDALI: Our exchange previously, yes, Your
8 Honor.

9 THE COURT: Okay.

10 MS. CENDALI: Up --

11 THE COURT: And the Government --

12 MS. CENDALI: Uh-huh.

13 THE COURT: -- you conceded that she was untruthful in
14 her deposition when she said she would call and had e-mailed
15 nurses about their notes, and she did not; the fact that she
16 had no handwritten notes, and she did; and that there were no
17 electronic notes made by her and her nurses in the comment
18 section, the Word documents, but they did use that as their
19 method of communication. And you and I agreed that that was
20 untruthful. Correct?

21 MS. CENDALI: Your Honor, with one clarification.
22 Dr. Clearwater did contact the nurses, at least Marna Bogan,
23 and asked her --

24 THE COURT: Right.

25 MS. CENDALI: -- to contact everyone to determine

1 whether or not there were notes.

2 THE COURT: But apparently that never happened, and
3 Ms. Jessee was never contacted. Correct?

4 MS. CENDALI: I believe that, but I do believe that
5 there may still be some miscommunication about what notes were
6 asked for, what notes were requested.

7 THE COURT: Well, Ms. Jessee said she was never asked
8 for any notes. Correct --

9 MS. CENDALI: I think she was --

10 THE COURT: -- until you asked for them?

11 MS. CENDALI: -- never asked for -- I think Ms.
12 Jessee's testimony is that she wasn't asked for the notes that
13 she was -- had produced at the deposition.

14 THE COURT: All right. I'm -- you know what, I'm not
15 going to -- I don't want you to dig yourself a hole, but that's
16 what we discussed and that she -- I understand you're trying to
17 come up with excuses for her, but it's apparent, I believe, and
18 I think you agreed, that Ms. Jessee was not asked about notes,
19 because that was her testimony that she was not asked about
20 notes until you asked her or her Government lawyer asked her
21 the day prior. Correct?

22 MS. CENDALI: That is Ms. Jessee's testimony, Your
23 Honor. Correct.

24 THE COURT: Okay.

25 So, is there anything else that you want to say?

1 MS. CENDALI: Yes, Your Honor, a few points.

2 I know Your Honor believes that Dr. Clearwater was
3 not being truthful, and I agree that the deposition testimony
4 looks as if there were inconsistencies in what Dr. Clearwater
5 had believed to be with respect to the notes.

6 I still believe, Your Honor, that this was an
7 honest mistake by Dr. Clearwater. I don't think that there was
8 any intention to mislead the Court or mislead the Government,
9 and I don't think that there was any malfeasance on
10 Dr. Clearwater's part. And, in fact, all of this goes to the
11 weight of her testimony, Your Honor.

12 And we're not saying that these late productions
13 were not a mistake, but the question I think before the Court
14 today is whether or not the level of conduct here is
15 sanctionable, and if so, what is the appropriate remedy in
16 light of the defendants' rights here.

17 And, Your Honor, I would submit that there was no
18 bad faith on the part of the Government. There was no bad
19 faith on part -- on the part of Dr. Clearwater. And this case
20 does not merit sanctions, let alone dismissal or exclusion of
21 Dr. Clearwater.

22 Defendants can make arguments in their *Daubert*
23 briefing, or have made arguments in their *Daubert* briefing.
24 And, Your Honor, the United States would not object to
25 supplemental briefing by the defendants to bolster any

1 arguments that they might have regarding Dr. Clearwater's
2 credibility, but Dr. Clearwater's credibility goes to the
3 weight of her testimony, not to whether or not she's qualified
4 to testify as an expert.

5 And, Your Honor, this is not the case where the
6 Government knew of notes and failed to turn them over or a case
7 where the Government failed to give any discovery or any
8 discovery orders, and any prejudice to the defendants can be
9 ameliorated by additional deposition testimony to elucidate
10 information concerning the notes or the draft profiles.

11 Those draft profiles were, the United States
12 believed at the time, to be drafts of the expert report, which
13 they were. A lot of the comments, Your Honor, are comments
14 about questions, but some of the questions are whether or not
15 there's -- the date is correct or the Bates number is correct.

16 And so, Your Honor, I would submit that any
17 sanctions in this case be short of dismissal or exclusion of
18 the expert.

19 THE COURT: Well, we're not talking about weight of
20 testimony. We're talking about credibility.

21 There were so many repeated, I think, untruths.
22 You call them mistakes now, but you agreed previously that they
23 were not truthful comments or representations to the Government
24 as well as in her deposition, that I can't find anything
25 other -- I can come to no other conclusion that she -- other

1 than she was untruthful in her deposition, when there's
2 repeated questioning about the same topics over and over again
3 and she says over the course of three days that she doesn't
4 recall, I can't find anything other than that's untruthful.
5 And you've agreed.

6 I also can't find when she says that she asked her
7 nurses about notes, and Jessee testified that she was never
8 asked about any notes until the day before, that that's
9 anything other than untruthful.

10 And I could go on and on, but I'm not going to
11 review everything that we've said here. But I will review --
12 and you can have a seat, Ms. Cendali.

13 MS. CENDALI: Thank you, Your Honor.

14 THE COURT: I will review what I have found here today
15 from the briefs and from the exhibits, from the deposition
16 transcripts.

17 First, that discovery closed on September 1. And
18 the Government's, I think, e-mail after that to defense counsel
19 that in compliance with their rolling production of documents
20 that things were being produced after that date is just a
21 nonstarter. There's no rolling production of documents after
22 discovery closes.

23 It's clear that -- clear -- it's clear that
24 Ms. Clearwater's notes should have been produced as well as
25 the -- her handwritten notes -- as well as the electronic

1 comment boxes and the drafts of the reports, the ones that were
2 made prior to being provided to Department of Justice, which
3 the Department of Justice concedes were discoverable and should
4 have been produced to the defendants in the course of the
5 discovery requests. The Department of Justice has also
6 conceded that, of course, by now producing all of these
7 documents.

8 The Department of Justice's expert reports were
9 first due on November 4th, 2016. The rebuttal experts were due
10 on January 13, 2017. The deposition of Ms. Clearwater was
11 August 23 to 25, and she was at that time, in addition to the
12 request for production of documents, in the deposition notice
13 directed to produce her notes, and she did not.

14 The defendants obviously should have had these
15 prior to the deposition being taken of Ms. Clearwater pursuant
16 to the discovery requests. And even if not produced prior,
17 which they should have been, they should have been produced at
18 the time of the deposition, and they were not.

19 During the deposition, Ms. Clearwater was asked
20 about whether she took notes. She repeatedly said she did not
21 recall. She never said that -- she said she searched right
22 before the deposition, but she never said that -- anything
23 about any confusion about what she was searching for with notes
24 or anything else.

25 She clearly said that she asked -- that she didn't

1 ask the nurses for notes, but represented on August 23 that she
2 would send an e-mail and do so or call and do so. Apparently,
3 that did not happen, according to Jessee's deposition.

4 She also repeatedly told the Department of Justice
5 and her attorneys that there were no notes and that she had
6 never asked the nurse -- that she had asked the nurses about
7 notes, and she apparently never did. She also said that she
8 didn't recall using the comment boxes on the Word document, the
9 beneficiary profiles, which I find totally not credible.

10 At the September 13 Jessee deposition, Ms. Jessee
11 testified that no one asked her for her notes until the day
12 before the deposition, which was Department of Justice's
13 attorneys. Even though on August 23 Clearwater promised to do
14 that. She also testified -- and had told the Department of
15 Justice attorneys that she had previously done that.

16 She also testified, Jessee did, that the comment
17 boxes on the Word file was how the reviewers in Clearwater
18 communicated, which is directly contrary to Clearwater's
19 testimony. And I don't really think that there's any ambiguity
20 about that at all in her deposition transcript to Clearwater's.

21 On September 14th, the defendants again asked for
22 the notes after Ms. Jessee's deposition. Then for the first
23 time on September 20th, the Department of Justice says that
24 there are notes. There's no details about them.

25 They also then said that there was the beneficiary

1 profile Word document notes that would be produced by August 2.
2 Yet, the Clearwater handwritten notes were not produced until
3 August 15th after the motions in limine were filed, a month
4 after Ms. Jessee's deposition. And, they didn't produce the
5 comment boxes on the Word documents until October 20th, not
6 October 2nd. October 20th. These were produced after the
7 motions in limine and after the motions for summary judgment.
8 They still have not produced the notes of the other reviewers.

9 I don't think that there's really any confusion
10 here on Ms. Clearwater's part as to what she was being asked in
11 terms of the notes, in terms of the comment boxes on the Word
12 document. I understand the Department of Justice's inclination
13 to try to somehow repair this, but I don't think that this is
14 reparable.

15 I think it's clear that she never actually looked
16 for her own notes. She repeatedly said she didn't call. But
17 the first time she ever actually looked for notes in the one
18 file cabinet in her own office, she found them, so I don't
19 think she ever looked. And this was conveniently after Ms.
20 Jessee's deposition, which means that that obviously was the
21 trigger for her having to look.

22 The Department of Justice never communicated to the
23 nurse reviewers directly. They only communicated through
24 Clearwater and in-house counsel. They never -- as far as I
25 have heard and what you've represented to me and in what the

1 brief and the declaration say, the Department of Justice never
2 specifically asked Ms. Clearwater where she looked for her
3 notes or if she looked for her notes specifically, how she
4 looked for her notes. They just asked if there were notes.
5 But there were no, from what I see, details in terms of their
6 questioning of Ms. Clearwater about notes.

7 I find it inconceivable and incredible that
8 Ms. Clearwater wouldn't remember making 131 pages of patient
9 notes, handwritten notes. As I said, it's a whole -- it's like
10 writing a book. It's a whole notebook full.

11 I file it -- find it utterly perplexing that she
12 could testify several times that she didn't recall using the
13 comment boxes in the Word documents when Jesse testified that
14 that was how they communicated, and the Government eventually
15 produced 5,000 pages with those notes. The only conclusion
16 that I can come to, because it defies explanation otherwise, is
17 that she was untruthful.

18 As far as the harm to the defendants, this should
19 have been produced, as I said, months ago if not a year ago.
20 This Government -- this discovery has been ongoing for a long
21 time. I am sure it's cost the defendants hundreds of thousands
22 of dollars, if not millions of dollars in legal fees and other
23 expert fees. They should have had it prior to the deposition
24 in response to the requests for production of documents.

25 They should have had it before the deposition.

1 They should have had it immediately after the deposition. The
2 notes contain significant differences and discrepancies from
3 the expert report: Changing times of therapy or not --
4 allowing the therapy and then not allowing therapy, and back
5 and forth.

6 There was obviously changing of minds, differences
7 of opinions between the nurse reviewers and Ms. Clearwater, and
8 none of that was produced to the defendants. They had no
9 opportunity to depose her about that or no opportunity to
10 depose the other nurse witnesses about that.

11 It also had to have affected their own expert
12 reports. Their expert reports were based on her expert
13 reports. And given what I think is now somewhat obvious from
14 the notes on there, that there's a sort of random nature of her
15 conclusions. And their experts, the defendants' experts, never
16 had an opportunity, because they didn't have these notes, to
17 comment on that in their expert reports.

18 I think that the Government's suggestion that a
19 remedy, the remedy that's appropriate here is a do over, is
20 ridiculous. We're not redoing a deposition that lasted three
21 days, that took hundreds of attorney hours to -- to prepare
22 for. We're not redoing motions in limine. We're not redoing
23 motions for summary judgment.

24 And the Department of Justice is not off the hook
25 here either in their conduct because I don't believe that they

1 adequately questioned Ms. Clearwater during the course of this
2 year about her lack of notes. I don't think that it was -- I
3 think that they should have asked the nurse reviewers directly
4 about it. But even if they -- even if that was excusable, what
5 I find inexcusable is the fact that they took a month to
6 produce her handwritten notes, one notebook, handwritten notes,
7 131 pages - they took a month to do that. They took over a
8 month, five weeks, to produce the electronic notes without
9 telling the defendants or even the Govern -- or the judge the
10 importance of these notes and suggesting that the motions be
11 held off until after they're produced.

12 I can't understand how it took so long to produce
13 them. And they were, in fact, not produced until after the
14 motions in limine were filed and after the summary judgment
15 motions were filed. Something that I am sure, again, cost not
16 probably tens of thousands, probably hundreds of thousand
17 dollars to produce. There's a lot of motions that are pending
18 before the Court.

19 So, as I mentioned before, the problem that I have
20 is not weight. It's credibility. And when I find -- and I do
21 find, now, that in many respects Ms. Clearwater's
22 testimony -- and seriously, pertinent respects in terms of
23 there not being any notes, because I think that's very
24 pertinent and I think it's obviously a huge issue on which they
25 could have cross-examined at her deposition. I think she just

1 didn't want to give them up, quite frankly. But, when I come
2 to the conclusion that she was untruthful to the Department of
3 Justice's attorneys and untruthful in her deposition, as the
4 Government attorneys have conceded, then -- then I can
5 find -- I cannot find that her testimony is credible or that
6 any do over would be an appropriate remedy.

7 I have come to the conclusion that Clearwater's
8 entire report must be stricken and that she must not be allowed
9 to testify because of her utter lack of credibility. It is
10 apparent to me, moreover, that the Government's case here was
11 frankly resting -- house of cards that was resting on
12 Ms. Clearwater's testimony. I think that her testimony and
13 what I've seen of the notes here reveal that -- that this was
14 a -- I think that this was a huge waste of money. I don't
15 think this case should have ever been brought.

16 I have -- I have looked at this stuff, and I'm
17 appalled, I'm embarrassed, I'm ashamed that the Department of
18 Justice would rely on this kind of nonsense by a nurse reviewer
19 to get involved in a *qui tam* case and cost these defendants
20 millions of dollars in legal fees.

21 So, her report is stricken. She's not allowed to
22 testify. I know you filed this notice that you were going to
23 file an amended expert report. I mean, not only is that moot
24 now, I don't know how you ever thought that you'd have the
25 ability to do that on the day that all of your exhibits are

1 due. That's -- that ship sailed long ago. Even if I didn't
2 find her credible, you would never have that opportunity again.

3 Under Rule 37, I, of course, am going to award
4 counsel fees and costs for bringing this motion. Frankly, I
5 wish, but I can find no vehicle for awarding counsel fees for
6 their preparation for the deposition of Ms. Clearwater and the
7 deposition itself and their costs involved in all of that. I
8 cannot find a method for awarding those costs now, but I think
9 that the defendants should be entitled to it because it's
10 obvious that her -- her deposition was a waste of time. But,
11 I'll leave that up to Mr. Dubelier, if he wants to bring
12 another motion later on in the case.

13 I know that Judge Hilton still has those motions
14 under consideration. I know he's going to be ruling on them,
15 but your motion is granted.

16 MR. DUBELIER: Thank you, Your Honor.

17 THE COURT: Court stands in recess.

18 MS. CENDALI: Thank you, Your Honor.

19 (PROCEEDINGS CONCLUDED AT 2:51 P.M.)

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1 UNITED STATES DISTRICT COURT)

2 EASTERN DISTRICT OF VIRGINIA)

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4 I, JULIE A. GOODWIN, Official Court Reporter for
5 the United States District Court, Eastern District of Virginia,
6 do hereby certify that the foregoing is a correct transcript
7 from the recorded proceedings of FTR Gold in the above matter,
8 to the best of my ability.

9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action in
11 which this proceeding was taken, and further that I am not
12 financially nor otherwise interested in the outcome of the
13 action.

14 Certified to by me this 30TH day of OCTOBER, 2017.

15

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17

18

/s/
JULIE A. GOODWIN, RPR
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